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ACCEPTED/FILED

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Federal Communications Commission
Office of the Secretary

June 26, 2013

Mr. Mark Nadel
Attorney Advisor
Federal Communications Commission
Wireline Competition Bureau
445 12th Street, SW
Washington, DC 20554

Via Email and First Class Mail

Re: CC Docket Nos. 16-45 and 02-6: Request for Review of Commitment
Adjustment Letter Issued to Aldine Independent School District

Billed Entity Number: 141224
Form 471 Application Number: 421086
Funding Request Number: 1160625

Dear Mark:

Thank you for your consideration of the issues in the matter of the Aldine Independent School District (Aldine) request for review of a Commitment Adjustment (COMAD) issued to Aldine by the Schools and Libraries Division of the Universal Service Administrative Company (USAC). The COMAD relates to some \$2.2 million paid by USAC in support of an equipment maintenance contract awarded by Aldine to Solid IT in 2004 (Solid IT Contract).

This letter is being sent, as promised, to document Aldine's position that E-Rate-eligible services in 2004 included maintenance contracts of the type awarded by Aldine to Solid IT, and that therefore the COMAD should be withdrawn. For 2004, the types of equipment maintenance agreements that were E-Rate eligible are described in the *Eligible Services List of the Schools and Libraries Support Mechanism* (Oct. 10, 2003) which is available at http://www.usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList_101003.pdf (ESL).

You and I have discussed this case several times, but for ease of reference, please allow me to restate some of the facts. Aldine contracted with Solid IT to provide support, repair, maintenance and firmware upgrades to telecommunications equipment in the Aldine schools. The maintenance contract was issued to Solid IT after a typical competitive

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process of technology plan development, request for proposals, sealed bidding, and bid evaluation. Two bids were received, one from Southwestern Bell and the other from Solid IT. The Solid IT bid was the lower bid. Solid IT was found to be a responsible bidder, and the contract was awarded and performed.

The Solid IT Contract entitled Aldine to off-site monitoring of Aldine's servers and required a Solid IT response within four hours when repair or replacement of equipment was necessary. The contract specified the charge for maintenance of multiple servers, switches and other electronic equipment. Firmware for all equipment was to be upgraded from off-site locations.

The Solid IT Contract was processed under normal USAC-approved procedures, with all facts and elements of the contract available for USAC review throughout the approval process. There was no doubt among Aldine's E-Rate and executive personnel that the contract was eligible for the E-Rate discounts. At no time during the contract's processing, or even in the COMAD, did USAC question the eligibility of the maintenance services.

In our discussions you have explained that the policy for treatment of maintenance contracts, equipment insurance payments and contingencies has been a matter of debate as to the appropriate level of E-Rate reimbursement. E-Rate beneficiaries, however, must live under the reimbursement policies as set out in the ESLs as published from year to year, without regard to policy considerations and without later being evaluated under changed standards.

Given the law and regulations applicable in 2004, I suggested three bases for treating the Solid IT Contract as an eligible service under the ESL.

1. The contract specified that it was for maintenance, defined in the ESL to involve "repair, replacement, or reconfiguration of eligible components." The sole purpose of the contract was to secure exactly these services, including the reconfiguration of hardware performance through firmware updates, making the Aldine-Solid IT contract described in the ESL and therefore eligible for E-Rate funding.
2. The ESL acknowledged the impossibility of forecasting either the cost or the extent of maintenance that might be needed, providing that "in cases in which the scope of the work makes it difficult to determine the specific costs beforehand, a service provider may include a reasonable contingency fee." Because the equipment that was the subject of the Solid IT Contract was critical to its educational mission, Aldine reasonably sought and paid for the assurance that it would have qualified maintenance technicians available on short notice throughout the year and that the

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equipment would be updated as necessary. Thus, the nature of the maintenance contract makes such a contingency fee a necessary element of the contract. Aldine paid Solid IT for not only the actual, line-item maintenance services provided, but also for Solid IT's ongoing availability to meet Aldine's maintenance needs and for the professional attention to updating the hardware. The Federal Communications Commission (Commission) provided the policy marker for this provision of the ESL in 2000, writing that "eligible schools and libraries should be able to enter into prepaid or multi-year contracts for supported services." *In the Matter of Request for Review of the Decision of the Universal Services Administrator by Brooklyn Public Library Brooklyn, New York*, 15 FCC Rcd. 18598, para. 6 (2000). Thus, the Commission provided the legal justification for the Aldine prepaid maintenance services contract.

3. In 2004, the Commission endorsed the purchase by E-Rate beneficiaries of maintenance services on an off-site, intermittent basis. The Commission wrote that

basic maintenance will include repair and upkeep of previously-purchased eligible hardware, wire and cable maintenance, and basic technical support, including configuration charges. On-site technical support is not necessary...when off-site technical support can provide basic maintenance on an as-needed basis.

Schools and Libraries Universal Service Support Mechanism, 69 FR 6181, Para. 23 (2004).

In order to provide "off-site technical support...on an as-needed basis," a service provider like Solid IT must maintain familiarity with a school's computer hardware, software and network configuration and must maintain staffing sufficient to ensure availability when services are needed. The service will necessarily include off-site attention to needed firmware and configuration changes. All service providers' bids will naturally reflect the costs of providing and preparing to provide the needed services. Therefore, the District's maintenance service contract is a "basic maintenance" contract that should be eligible for full reimbursement.

In our discussions, you emphasized the requirement that services be "cost-effective." I agree that this is important both as a policy consideration and in administration of the E-rate program. The mechanism by which USAC ensures cost effectiveness is competitive bidding. The Commission has held that "seeking competitive bids for eligible services is the most efficient means for ensuring that eligible schools and libraries...are most likely to receive cost-effective services." *Request for Review by Macomb Intermediate School District*

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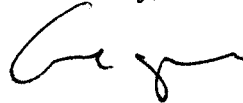
Technology Consortium of the Decision of the Universal Service Administrator, 22 FCC Rcd 8771, 8772 (2007).

Aldine employed competitive bidding in securing its maintenance services. Given the extensive array of technical equipment and services that Aldine needed and the mandated use of competitive bidding to winnow out-of-market proposals, it would be unreasonable to expect Aldine officials to go outside the Commission's general standard for cost-effectiveness (i.e., competitive bidding) and apply independent, subjective tests to establish the cost-effectiveness of each line item in the maintenance contract proposals. Indeed, such tests would detract from the objectivity of competitive bidding and could even open the door to unpredictable threats to the integrity of the contract process.

In conclusion, I hope that in comparing the ESL terms and the contract procedures followed by Aldine you will reach the conclusion that the Aldine contract was reasonably awarded and that it was for properly reimbursable maintenance services that are covered by the ESL.

Thank you again for your consideration of the Aldine request for review. I look forward to speaking with you again.

Sincerely,



George M. Foote